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No. 08-___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GENA MARIE DUNPHY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gena Marie Dunphy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a) is published at 551 F.3d 247. The district court's opinion (Pet. App. 22a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 2009. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

The relevant sections of the Sentencing Reform Act and the United States Sentencing Guidelines are reproduced at Pet. App. 32a-44a.

STATEMENT OF THE CASE

This case presents a pressing issue concerning the administration of criminal justice across the country, over which the federal courts are openly divided: whether the Federal Sentencing Guidelines

are binding when a revised guideline range causes a district court to impose a new sentence pursuant to 18 U.S.C. § 3582. The United States Court of Appeals for the Fourth Circuit held that they are, in fact, binding.

1. In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the Federal Sentencing Guidelines violate the Sixth Amendment when they require courts to increase defendants' sentences above otherwise binding limits based on facts not proven to a jury beyond a reasonable doubt. The Court rendered the Guidelines advisory to cure this constitutional infirmity.

The Court followed *Booker* with *United States v. Kimbrough*, 128 S. Ct. 558 (2007), which confirmed that district courts have discretion to deviate on "policy" grounds from guidelines ranges applicable to crack cocaine offenders. The Court's recent opinion in *United States v. Spears*, 129 S. Ct. 840 (2009) (per curiam), reaffirmed *Kimbrough*'s holding that the crack guidelines, "'like all other Guidelines, are advisory only.'" *Id.* at 842 (quoting *Kimbrough*, 128 S. Ct. at 560).

2. Part of the original Sentencing Reform Act, 18 U.S.C. § 3582(c)(2), permits a defendant to make a motion for relief when the Sentencing Commission has amended the guidelines range applicable to that defendant's offense and made the amendment retroactive. Some courts call such proceedings "resentencing[s]," *e.g.*, *United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007), and others call them sentence "modification[s]" or "reduction[s]," *e.g.*, *United States v. Rhodes*, 549 F.3d 833, 839-40 (10th Cir. 2008); Pet. App. 9a. But regardless of what label

is applied, Section 3582(c)(2) directs courts to determine whether revisiting a defendant's sentence in light of a revised guidelines range would be consistent with applicable policy statements issued by the Sentencing Commission. Courts that grant a Section 3582 motion recalculate the defendant's guideline range from the ground up using the "retroactive" guidelines. U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.] § 1B1.10(c) & cmt. n.1(B)(i)-(iii) (2008). They then impose a "New Term of Imprisonment," Pet. App. 31a, that replaces the old one *nunc pro tunc*.

The day after this Court's decision in *Kimbrough*, the Sentencing Commission revisited its policies relating to retroactive guidelines. Specifically, it promulgated a new policy statement "clarifying when, and to what extent, a sentencing reduction is considered consistent with the policy statement and therefore authorized under 18 U.S.C. § 3582(c)(2)."[1] The new policy statement, save for an exception not relevant here, prohibits district court judges from imposing a new sentence in a Section 3582(c)(2) proceeding that is "less than the minimum term of imprisonment provided by the amended guideline range." U.S.S.G § 1B1.10 cmt. n.3.[2]

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[1] United States Sentencing Commission, Federal Register Notices, http://www.ussc.gov/NOTICE.HTM (last visited March 20, 2009).

[2] The amended policy statement permits judges to sentence a defendant below the amended guidelines range only "if the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range

3. Petitioner Gena Marie Dunphy is one of the thousands of federal prisoners who has been affected by recent amendments to the Guidelines. In August of 2002, an undercover police officer telephoned petitioner's mother to arrange the purchase of a small amount of crack cocaine. Petitioner transported the drugs to the agreed-upon meeting spot, and the officer arrested her upon arrival. Petitioner cooperated with the police and ultimately pleaded guilty to a single count of aiding and abetting the possession of at least five grams of crack cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B).

Petitioner's offense of conviction carried a base offense level of 26. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(7) (2002). This offense level, combined with her lack of any criminal history, yielded a sentencing guidelines range of 63-78 months. *See id.* ch. 5, pt. A, sentencing tbl. The district court, however, increased Dunphy's base offense level to 36 based on its findings that she possessed a firearm during the offense of conviction and was responsible for at least 150 grams of crack cocaine. After granting petitioner a three-offense-level acceptance of responsibility reduction, these adjustments yielded an offense level of 33 and an applicable guidelines range of 135-168 months. Pet. App. 24a. The district judge sentenced petitioner to 135 months – the lowest possible sentence within

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applicable to the defendant at the time of sentencing." U.S.S.G. § 1B1.10 cmt. n.3.

that range. Pet. App. 24a. Petitioner did not appeal, and her sentence became final in 2003.

In 2007, the Sentencing Commission revised the guidelines applicable to crack cocaine offenses. Prior to the amendments, the Guidelines treated one gram of crack cocaine as equivalent to 100 grams of powder cocaine in assigning guidelines ranges for cocaine offenses. Recognizing that the 100:1 ratio produced an "urgent and compelling problem" that "significantly undermine[d]" Congress's purposes in enacting the Sentencing Reform Act, the Commission reduced the applicable ratio to 20:1, which in turn reduced the base offense level for all crack cocaine offenses by two levels. U.S.S.G. app. C, at 221 (2008). The Commission made this amendment retroactive as of March 3, 2008. *See* U.S.S.G. § 1B1.10(c); 73 Fed. Reg. 217 (Jan. 2, 2008).

Based on these amendments, petitioner moved under Section 3582(c)(2) for resentencing. Petitioner requested a new sentence below her amended guideline range, arguing under *Booker* that the district court should treat the revised guidelines range as only advisory. Pet. App. 25a. The district court determined that petitioner was eligible for a new sentence based on the crack guideline amendments. Pet. App. 22a-23a. The court recalculated her base offense level at 31 (two levels lower than before), carrying forward its earlier findings and calculations. Pet. App. 24a. This resulted in a new guidelines range of 108-135 months. Pet App. 24a. The district court, however, denied petitioner's request that it impose a sentence below 108 months, concluding that U.S.S.G. § 1B1.10 precluded it from imposing any sentence below the applicable guideline range. Pet

App. 25a. Accordingly, the district court entered a "New Term of Imprisonment" of 108 months. Pet. App. 31a.

4. Petitioner appealed the district court's refusal to consider imposing a below-guideline sentence, and the Fourth Circuit affirmed. The Fourth Circuit acknowledged that *Booker*'s advisory regime applies to "full sentencing hearings." Pet. App. 11a. But the Fourth Circuit reasoned that Section 3582 proceedings "do not constitute a full resentencing of the defendant." Pet. App. 8a-9a. Consequently, the Fourth Circuit held that the requirement in U.S.S.G. § 1B1.10 that amended guideline ranges be treated as binding does not run afoul of the Sixth Amendment. Pet. App. 8a-10a (quoting U.S.S.G. § 1B1.10(a)(3)). The court also concluded that *Booker*'s remedial, statutory holding rendering the Guidelines advisory across the board is "inapplicable" in Section 3582 proceedings. Pet. App. 11a. In the Fourth Circuit's view, such proceedings do not implicate the administrability concerns that led this Court in *Booker* to conclude that the Guidelines should not be kept binding insofar as they do not violate the Sixth Amendment. Pet. App. 9a-17a.[3] In reaching both of these holdings, the court acknowledged that its conclusions conflicted with the

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[3] The Fourth Circuit also rejected petitioner's argument that "the express limitation on the extent of her sentence reduction established by U.S.S.G. § 1B1.10(b) should be disregarded as a matter of statutory interpretation," wholly apart from *Booker*'s remedial holding. Pet. App. 17a. Petitioner does not renew that argument here.

Ninth Circuit's decision in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007). Pet. App. 14a-15a.

REASONS FOR GRANTING THE WRIT

Federal courts across the country are divided over whether federal district courts must treat amended sentencing guidelines ranges as binding when imposing new sentences under 18 U.S.C. § 3582, or whether this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), requires that they be treated as only advisory. This question is important and arises frequently, particularly in the context of the amended guidelines for crack cocaine offenses. This is such a case and is an ideal vehicle for resolving the split of authority.

The Fourth Circuit's holding that district courts must treat the Guidelines as binding in 18 U.S.C. § 3582 proceedings also is wrong. This Court held in *Booker* that the Guidelines violate the Sixth Amendment when they require a longer sentence than is otherwise allowed based on the elements of the crime of conviction. *Id.* at 244. Such is the case here. Furthermore, treating the Guidelines as binding when constructing a new sentence flouts *Booker*'s mandate that binding guidelines are "no longer an open choice." *Booker*, 543 U.S. at 263; *accord United States v. Spears*, 129 S. Ct. 840, 842 (2009) (per curiam) (Guidelines are "advisory only") (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 560 (2007)).

It is no answer to claim, as the Fourth Circuit does and the Sentencing Commission suggests, that proceedings under Section 3582 do not constitute "full" resentencings. Pet. App. 8a-9a, 11a, 15a. That

is just a label. District courts impose new sentences under Section 3582 the same way they conduct other resentencings. And whenever a court reopens a sentence and constructs a new one, it must do so in accordance with the law that exists at the time the new sentence is imposed, not just with (retroactive) sentencing guidelines. *Booker* is the law; this Court should instruct the federal courts of appeals again that they must follow it.

I. Federal Courts Are Divided Over Whether Sentencing Guidelines Ranges Are Binding In Section 3582 Proceedings.

Recent retroactive amendments to the Federal Sentencing Guidelines, particularly the recent amendment to the crack cocaine guidelines under U.S.S.G. § 1B1.10, have given rise to thousands of new sentences under Section 3582. In the wake of *Booker*, the federal courts have become sharply divided over whether the directives in U.S.S.G. § 1B1.10 validly preclude district court judges from imposing such new sentences below the revised guidelines ranges. This division of authority is ripe for this Court's review.

1. Six federal courts of appeals require courts to treat amended guidelines ranges as binding when imposing new sentences under Section 3582.

In this case, the Fourth Circuit held that district courts may not sentence defendants in Section 3582 proceedings below the bottom ends of their applicable guidelines ranges. Pet. App. 8a-9a. The Fourth Circuit first ruled that imposing a binding guideline sentence in a Section 3582 proceeding does not violate the Sixth Amendment as construed in *Booker*.

The court asserted that the Sixth Amendment does not apply because Section 3582 proceedings are not "full" resentencings and because the new sentences that are imposed do not, in any event, use factual findings to expose defendants to higher sentences than otherwise are permissible. Pet. App. 10a-11a.

Second, the Fourth Circuit asserted that treating the Guidelines as binding in Section 3582 proceedings does not violate *Booker*'s remedial holding that the Guidelines may not be treated as binding. The court of appeals concluded that the Sentencing Commission had the power to mandate that the Guidelines be binding in this context because Section 3582 proceedings do not implicate the concerns that led this Court to reject a mixed mandatory-advisory scheme. Pet. App. 11a-12a.

Five other federal courts of appeals have similarly held that U.S.S.G. § 1B1.10 legitimately restricts district courts' discretion to reduce sentences in Section 3582 proceedings. *See United States v. Fanfan*, __ F.3d __, No. 08-2062, 2009 WL 531281 (1st Cir. Mar. 4, 2009); *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009); *United States v. Melvin*, __ F.3d __, No. 08-13497, 2009 WL 236053 (11th Cir. Feb. 3, 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008), *petition for cert. filed* (U.S. Jan. 21, 2009) (No. 08-8318). Two of these decisions have triggered judges sitting on subsequent panels to register their disagreement. *See United States v. Harris*, __ F.3d __, No. 08-2774, 2009 WL 465945 (8th Cir. Feb. 26, 2009) (Bye, J., concurring); *United States v. Pedraza*, 550 F.3d 1218 (10th Cir. 2008) (McKay, J., dissenting).

2. As the Fourth Circuit acknowledged, Pet App. 14a-15a & n.4, federal courts are divided on this issue. In particular, the Fourth Circuit's decision squarely conflicts with decisions of three other federal courts, including the Ninth Circuit, holding that *Booker* precludes courts in Section 3582 proceedings from treating amended guidelines ranges as binding.

In *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that district courts are permitted in Section 3582 proceedings to impose new sentences below amended, retroactive guidelines ranges. The Ninth Circuit concluded that to the extent that the Sentencing Commission's policy statements require district courts to treat amended guidelines ranges as binding, those statements run afoul of *Booker*, and must therefore "give way." *Id.* at 1173.

Two federal district courts in circuits yet to weigh in on the issue also have concluded that courts must be permitted in Section 3582 proceedings to impose new sentences below the amended guidelines ranges. *See United States v. Blakely*, No. 3:02-CR-209-K, 2009 WL 174265 (N.D. Tex. Jan. 23, 2009); *United States v. Ragland*, 568 F. Supp. 2d 19 (D.D.C. 2008).[4] Furthermore, Judge Lynch of the Southern District of New York has observed that "it would be, to say no more, ironic if the relief available to a defendant who received a sentence that is now

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[4] The government filed a notice of appeal in *Ragland*, but later moved to dismiss its appeal. *See* Order, *United States v. Ragland*, No. 08-3092 (D.C. Cir. Nov. 7, 2008).

recognized to have been unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline." *United States v. Polanco*, No. 02 Cr. 442-02(GEL), 2008 WL 144825, at *2 (S.D.N.Y. Jan. 15, 2008).

Finally, as noted above, judges in the Eighth and Tenth Circuits have noted that they disagree with decisions allowing the Guidelines to be treated as binding in Section 3582 proceedings. In the Eighth Circuit, Judge Bye has argued that "§ 1B1.10 cannot restrict a resentencing court's discretion to sentence outside of the amended guidelines range because it is, like all of the Guidelines, advisory under *United States v. Booker*." *Harris*, 2009 WL 465945, at *2 (Bye, J., concurring). In the Tenth Circuit, Judge McKay has contended that, under *Booker*, trial courts should not "feel constrained to treat the bottom of the amended guidelines range as a mandatory floor." *Pedraza*, 550 F.3d at 1223 (McKay, J., dissenting).

3. This conflict has been well ventilated, and the time has come for this Court to step in. Federal courts have had ample time to digest both *Booker* and *Kimbrough* and have continued to reach conflicting decisions. Recent courts to address the issue have just chosen sides in the circuit split without extensive analysis. *See, e.g.*, *Fanfan*, 2009 WL 531281; *Melvin*, 2009 WL 236053; *Starks*, 551 F.3d at 839. Moreover, given the thoroughness of the opinions already issued, it is unlikely that future opinions will shed further light on the debate.

The split also is causing unwarranted sentencing disparities across the country. While several circuits now forbid below-guidelines sentences in Section 3582 proceedings, district courts throughout the Ninth Circuit – where over 500 crack offenders alone are eligible for resentencing[5] – are following *Hicks* and imposing below-guidelines sentences for some offenders. *See, e.g.*, Order, *United States v. Fox*, No. 3:96-cr-00080 JKS, at 6-8 (D. Alaska Nov. 20, 2008) (giving defendant new sentence more than eleven years lower than revised guidelines range); *see also United States v. Thigpen*, CR 92-749 SVW, 2008 WL 4926965, at *2 (C.D. Cal. Nov. 12, 2008) (noting district courts' authority to impose below-guidelines sentences); *United States v. Mitchell*, No. CR92-1317 FDB (JET), 2008 WL 2489930, at *1 (W.D. Wash. June 19, 2008) (same). The same is true in the District of Columbia and the Northern District of Texas, *see supra*, at 10, where over 600 crack offenders are eligible for resentencing. Impact Memorandum, *supra*, at 14 tbl.2.

II. The Confusion Over The Question Presented Significantly Impacts The Administration Of Criminal Justice.

1. The question presented here affects a large number of individuals. The Sentencing Commission

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[5] Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 15 tbl.3 (Oct. 3, 2007) [hereinafter Impact Memorandum].

has rendered twenty-seven amendments retroactive, *see* U.S.S.G. § 1B1.10(c), making defendants convicted of a variety of crimes – including drug trafficking, fraud, weapons offenses, and various forms of theft – eligible for modified sentences under Section 3582. *See id.* app. C (describing amendments to the Guidelines).

According to the Sentencing Commission, the retroactive application of Amendment 706 alone made approximately 19,500 offenders eligible for reduced sentences. *See* Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 4-5 (Oct. 3, 2007) [hereinafter Impact Memorandum].

From March 3, 2008, when Amendment 706 became retroactive, through January 21, 2009, district courts have granted 12,723 motions under Section 3582 for new sentences. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2009). Given the uncertainty concerning *Booker*'s applicability to Section 3582 proceedings, many of these decisions are presumably on appeal right now.

2. It also is important to recognize that the question presented is not a "transitional" issue affecting only defendants who were initially sentenced prior to *Booker*. Section 1B1.10 applies equally to defendants initially sentenced in the post-*Booker* world, creating the perverse effect of binding defendants sentenced today to the amended guidelines ranges established for their offense if they later become eligible for new sentences under Section

3582. For example, according to the Sentencing Commission, 7,187 defendants were sentenced for crack offenses after *Booker* but before Amendment 706 took effect. *See* Impact Memorandum, *supra*, at 5. So long as the decisions such as the Fourth Circuit's remain law, these and other defendants eligible for sentence reductions will be subjected to binding applications of the Guidelines if they seek modifications under Section 3582. *See* U.S.S.G. § 1B1.10(b)(2)(a).

III. This Case Is An Excellent Vehicle For Considering The Question Presented.

1. Petitioner is a prime candidate for a sentence below the amended crack cocaine guidelines range. Petitioner was not a major player in a drug distribution ring. Instead, petitioner acted simply as a courier, delivering drugs purchased from her mother. Petitioner sold drugs only to support her drug habit. She had no criminal record prior to her offense, and her offense was nonviolent. She has accepted full responsibility for her actions and apologized to her family, friends, and community for her wrongdoing.

2. The district court sentenced petitioner to the minimum possible guidelines sentence in both the initial and later sentencing proceedings. In her initial sentencing proceeding, petitioner's offense level yielded a guidelines range of 135-168 months; the judge sentenced her to 135 months. Pet. App. 24a. At resentencing, the amended guidelines yielded a guidelines range of 108-135 months; the judge sentenced her to 108 months. Pet App. 24a. Nothing in the record suggests that the district court would

not have given her a lower sentence if it had understood that it could.

3. The Fourth Circuit extensively analyzed both the statutory and constitutional arguments involved. *See* Pet. App. 9a-20a. Indeed, the Fourth Circuit's opinion has become a polestar for other courts on its side of the split. *See United States v. Fanfan*, __ F.3d __, No. 08-2062, 2009 WL 531281, at *4 (1st Cir. Mar. 4, 2009); *United States v. Cunningham*, 554 F.3d 703, 706-08 (7th Cir. 2009); *United States v. Melvin*, No. 08-13497, 2009 WL 236053, at *3-*4 (11th Cir. Feb. 3, 2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir. 2009).

IV. The Fourth Circuit's Decision Is Incorrect.

A. Treating The Guidelines As Binding In A Section 3582 Proceeding Violates The Sixth Amendment.

1. *United States v. Booker* prohibits treating a sentencing guideline range as binding when it exposes an offender to a longer sentence than is otherwise permissible based on the facts found by the jury. 543 U.S. 220, 232-35 (2005). The Fourth Circuit's opinion condones just that result.

Petitioner pleaded guilty to a charge of possession of at least five grams of crack cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(B). At her new sentencing, the elements of that offense, in light of her lack of any criminal history, would have yielded a guidelines

range of 60-63 months.[6] However, the district court sentenced petitioner within a guidelines range of 108-135 months, based upon its factual findings that she possessed a firearm and at least 150 grams of crack cocaine.[7]

Petitioner's 108-month sentence thus violated the Sixth Amendment because it was 45 months longer than the sentence allowed by her conviction alone. The imposed sentence was based upon facts neither found by a jury nor admitted pursuant to a waiver of the *Booker* right to have a jury find sentence-enhancing facts.

2. None of the Fourth Circuit's reasons for refusing to follow this straightforward Sixth Amendment analysis withstands scrutiny.

a. The Fourth Circuit conceded that *Booker* applies to "*full sentencing hearings* – whether in an initial sentencing or in a resentencing where the

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[6] The applicable guidelines range was actually 51-63 months, but 21 U.S.C. § 841(b)(1)(B) carries a five-year mandatory minimum for possession of more than five grams of crack cocaine.

[7] Petitioner stipulated to these facts at her initial, pre-*Booker* sentencing hearing. That stipulation, however, did not constitute a waiver or otherwise entitle the district court to rely on those purported facts in the post-*Booker* sentencing. A court "cannot presume a waiver of [the right to jury trial] from a silent record" – that is, a record that lacks evidence of a knowing and voluntary waiver of the right to have a jury find the specific facts at issue. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969); *see also United States v. Gonzalez-Flores*, 418 F.3d 1093, 1103 (9th Cir. 2005) (enforcing this rule in context of pre-*Booker* stipulation).

original sentence is vacated for error." Pet. App. 11a; *see also United States v. Nolley*, 27 F.3d 80, 82 (4th Cir. 1994) (holding that constitutional rights, such as the right to counsel, apply "where the purpose of the hearing is to impose a new sentence after the original sentence has been set aside"). Yet the Fourth Circuit held that the Sixth Amendment does not apply in Section 3582 proceedings because, in the words of Section 1B1.10, such proceedings are not "full" resentencing hearings. *See* Pet. App. 8a-9a (quoting U.S.S.G. § 1B1.10(a)(3)).

The Fourth Circuit's holding rests on a "false . . . dichotomy." *See United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007). There is no practical difference between a Section 3582 proceeding and an ordinary resentencing hearing. In either case, a district court calculates a "New Offense Level" and a "New Criminal History Category" to yield a "New Guideline Range." Pet. App. 31a. Moreover, pursuant to the Commission's own policy statement, courts in Section 3582 proceedings, just as in any other resentencing proceeding, should craft a new sentence based in part on the factors listed in 18 U.S.C. § 3553(a), public safety implications, and even offenders' conduct in prison after imposition of their original sentences. U.S.S.G. § 1B1.10 cmt. n.1(B)(i)-(iii).

Regardless of how a Section 3582 proceeding is characterized, therefore, the effect of such a proceeding is the same as any other resentencing: the offender receives a new term of imprisonment. Pet. App. 31a. And when the right to jury trial is at issue, "label[s]" do not control; actual effects do. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 494 (2000); *see also*

Ring v. Arizona, 536 U.S. 584, 602 (2002) ("The dispositive question" in this area of law "'is one not of form, but of effect.'" (quoting *Apprendi*, 530 U.S. at 494)). Indeed, in this case, the only difference between the resentencing under Section 3582 and any other resentencing was that the district court bound itself by the applicable guidelines range. But that is exactly why the proceeding violated the Sixth Amendment.

To be sure, Congress generally is not obligated to require courts to reopen final judgments. But "there can be no expectation of finality in the original sentence" when Congress specifically provides that it is subject to further review, *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980), or replacement, *see United States v. Caraballo*, 552 F.3d 6, 9 (1st Cir. 2008) (Section 3582 trumps finality objections); *United States v. Pedraza*, 550 F.3d 1218, 1220 (10th Cir. 2008) ("§ 3582(c)(2) . . . affords a narrow exception to the usual rule of finality of judgments."). Nor can Congress deny defendants constitutional protections simply because it confers a proceeding as "an act of grace." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (when Congress provides a means for challenging criminal convictions that it need not provide, Congress "must nonetheless act in accord with the dictates of the Constitution"); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'").

Any holding to the contrary would raise serious separation of powers concerns. Building on the basic tenets of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803), this Court has emphasized that Congress may not confer jurisdiction on a federal court and then "direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them." *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J. dissenting), *cited with approval in United States v. Sioux Nation*, 448 U.S. 371, 392 (1980). "[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it." *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting); *see also Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) (Congress may not pass a law and "then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law"; courts "must apply all applicable laws in rendering their decisions").

There is no law more fundamental than the Constitution. Requiring federal courts to treat the Guidelines as binding because Congress and the Sentencing Commission have labeled certain proceedings in which defendants are given new sentences as less than "full" resentencings infringes on the courts' duty to apply the Constitution in resolving cases and controversies. Indeed, the Second Circuit recognized in a similar context that a statute instructing the Sentencing Commission to specify a guidelines range for an offense cannot restrict the courts' authority to impose lower sentences for that

offense. *See, e.g.*, *United States v. Sanchez*, 517 F.3d 651, 663-65 (2d Cir. 2008).

b. The Fourth Circuit also reasoned that *Booker*'s holding does not apply because district courts need not initiate Section 3582 proceedings at all. Pet. App. 10a. While true, this fact is irrelevant. Though district courts have discretion in determining whether to commence a new sentencing proceeding under Section 3582, they must comply with the Constitution when they choose to do so.

Indeed, this Court has made clear that *Booker* and its Sixth Amendment predecessors are not limited to situations in which the court is *required* to alter a defendant's sentence; rather, the doctrine applies whenever a court is *authorized* to impose a prison term based on facts not found by a jury. *See Apprendi*, 530 U.S. at 483 (doctrine applies where "the determination of a fact, . . . if found, *exposes* the criminal defendant to a penalty exceeding the [otherwise-applicable] maximum") (emphasis added); *see also Ring*, 536 U.S. at 602 (*Apprendi* applies when a fact "authorize[s]" the death penalty). Where, as here, a district judge uses facts not found by a jury to determine a defendant's sentence, that judge violates *Booker* notwithstanding his initial discretion concerning whether to reopen the sentence.

c. Finally, the Fourth Circuit reasoned that *Booker* does not apply to Section 3582 proceedings because such proceedings "can only decrease – not increase – the defendant's sentence." Pet. App. 11a. In practice, however, Section 3582 proceedings operate as new sentencing hearings that recalculate defendants' sentences from scratch. And while such proceedings result in new sentences that "reduce"

offenders' terms of imprisonment compared to the terms they originally received, 18 U.S.C. § 3582(c)(2), this does not change the fact that these new sentences are *longer* than would otherwise be allowed based solely on the elements of the crimes of conviction. Because the Sixth Amendment applies to the finding of any fact that is "legally essential to the punishment to be inflicted," *Harris v. United States*, 536 U.S. 545, 561 (2002), the application of judicially found facts in Section 3582 proceedings violates the Constitution. A previous, unconstitutional sentence cannot be used as a baseline for a new sentence.[8]

B. Treating The Guidelines As Binding In A Section 3582 Proceeding Violates *Booker*'s Remedial, Statutory Holding.

The *Booker* decision includes not just a constitutional ruling but also a new construction of the Sentencing Reform Act for all cases going forward. By forbidding district courts from deviating below amended guidelines ranges, U.S.S.G. § 1B1.10 improperly attempts to resurrect the binding

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[8] To the extent that the district court's decision to carry forward the unconstitutional elements of petitioner's prior sentence can be read to rely upon the law of the case doctrine, the intervening decision in *Booker* would render that reliance inappropriate. Even the law of the case doctrine contains an exception for intervening changes in law. *See, e.g., Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008); *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000); *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993); *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1441 (11th Cir. 1984).

guidelines scheme that *Booker* excised from the Sentencing Reform Act.

1. In *Booker*, the government urged this Court to render the Guidelines advisory in some cases and to leave them binding in others. *Booker*, 543 U.S. at 265-67. This Court rejected that argument, holding that binding guidelines are "no longer an open choice." *Id.* at 263. This Court has specifically reaffirmed this holding twice with respect to crack offense guidelines, making clear that the Guidelines are "advisory only." *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (quoting *United States v. Kimbrough*, 128 S. Ct. 558, 564 (2007)).

In light of these holdings, the instruction in U.S.S.G. § 1B1.10 to treat amended guideline ranges as binding in Section 3582 proceedings must itself be treated as advisory. As Judge Bye put it, "§ 1B1.10 cannot restrict a resentencing court's discretion to sentence outside of the amended guidelines range because it is, like all of the guidelines [establishing sentencing ranges], advisory under *United States v. Booker*." *United States v. Harris*, __ F.3d __, No. 08-2774, 2009 WL 465945, at *2 (8th Cir. Feb. 26, 2009) (Bye, J., dissenting); *see also Hicks*, 472 F.3d at 1170.

Any other result would render U.S.S.G. § 1B1.10 invalid on its face. As this Court has made clear, directions in the Guidelines Manual are valid only insofar as they are consistent with federal statutory law. *Stinson v. United States*, 508 U.S. 36, 38 (1993). And the Sentencing Reform Act, as modified by *Booker*'s remedial holding, prohibits guidelines sentencing ranges from being treated as mandatory. Accordingly, to the extent there is an unavoidable

conflict between the Act as modified and U.S.S.G. § 1B1.10, the latter must give way.

2. Nevertheless, the Fourth Circuit concluded that there is no need to apply *Booker*'s remedial holding in Section 3582 proceedings because the concerns about a mixed mandatory-advisory guidelines system are not present in that context. Each of the Fourth Circuit's arguments lacks merit.

a. The Fourth Circuit asserted that because *Booker* severed only Section 3553(b) and Section 3742, and not Section 3582, the latter provision was "not affected by *Booker*." Pet. App. 11a. This conclusion ignores the fact that Section 3582 was not at issue in *Booker*. Even if it had been, this Court would not necessarily have had to sever any of it. Section 3582 compels constitutional violations only when combined with U.S.S.G. § 1B1.10. And the language in U.S.S.G. § 1B1.10's current policy statement rendering the Guidelines binding – "the court *shall not reduce* the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range" – was not enacted until after *Booker* was decided. U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added). [9]

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[9] In January 2005, when *Booker* was decided, the applicable policy statement read only: "In determining whether and to what extent a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. 3582(c)(2), the court should *consider* the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b) (2004) (emphasis added).

b. The Fourth Circuit also noted *Booker*'s conclusion that Congress would not have wanted a system of "one-way levers" that circumscribes judges' ability to depart in one direction while leaving their departure discretion unfettered in the other direction. Pet. App. 12a; *see Booker*, 543 U.S. at 257-58. Since Section 3582 is a "one-way lever," allowing only new sentences that are lower than previous ones, the Court of Appeals concluded that *Booker*'s rationale must not apply. Pet. App. 12a.

The Fourth Circuit's reasoning turns *Booker* on its head. This Court rejected the "one-way lever" scenario in *Booker* in order to require courts *always* to treat the Guidelines as advisory, not to allow for exceptions. Courts must treat the Guidelines in Section 3582 proceedings as advisory as well.

c. The *Booker* Court also noted that a mixed mandatory-advisory system would create "administrative complexities." 543 U.S. at 266-68. Concluding that there are no "administrative complexities" in having binding guidelines in the Section 3582 context and advisory guidelines everywhere else, the Fourth Circuit reasoned that the Guidelines could be binding in Section 3582 proceedings. Pet. App. 12a.

This argument misses the forest for the trees. *Booker*'s remedial holding is explicitly premised on the assumption that a uniformly advisory guidelines system will prove more administrable for lower courts. *Booker,* 543 U.S. at 266-68. In any event, *Booker* rejected the argument that its remedial holding should be limited only to situations where advisory guidelines would be convenient; "such a two-system proposal seems unlikely to further Congress'

basic objective of promoting uniformity in sentencing." *Id.* at 267.

d. Finally, the Fourth Circuit contended that it would create "patent inequity among convicted defendants" to give defendants eligible for resentencing the benefit of "further reduction" under advisory guidelines since ineligible defendants cannot avail themselves of the *Booker* remedy. Pet. App. 15a-16a. This inequity, however, is nothing more than the product of the normal application of resentencing procedures. As the Fourth Circuit itself recognized in another case in which an offender gained the right to a resentencing under *Booker* only because his original sentence was vacated on non-*Booker* grounds:

> It could certainly be said that Butler was fortunate that the district court twice sentenced him incorrectly, thus continuing his case long enough for *Booker* to be decided before the latest sentence was imposed. But, it is not unusual for temporal happenstance to control whether a criminal defendant receives the benefit of a Supreme Court decision. And, Butler is no less "deserving" of benefitting from *Booker* than are any of the other defendants who happened to have been sentenced after *Booker* was decided. The fact is that when Butler was sentenced, *Booker* had already been decided, and that is all that matters.

United States v. Butler, 139 Fed. Appx. 510, 512 (4th Cir. 2005).

Moreover, the "anomaly" of carving out crack offenders for resentencing was created only by the Sentencing Commission's decision to make the new crack guidelines retroactive. The true "patent inequity" would be to subject the subset of crack offenders eligible for resentencing to a mandatory sentencing system ruled unconstitutional four years ago. This injustice would be compounded by the fact that this subset of offenders is eligible for resentencing precisely because both the Sentencing Commission and this Court deemed their prior sentences inequitable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 20, 2009

APPENDIX

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,
v.

GENA MARIE DUNPHY, Defendant-Appellant.

No. 08-6919

Appeal from the United States District Court
for the Northern District of West Virginia, at Clarksburg
John Preston Bailey, Chief District Judge
(3:02-cr-00045-JPB-1)

Argued: Oct. 29, 2008

Decided: Jan. 5, 2009

Before WILKINSON AND DUNCAN, Circuit Judges, and Richard D. BENNETT, United States District Judge for the District of Maryland, sitting by designation.

Affirmed by published opinion. Judge Duncan wrote the opinion, in which Judge Wilkinson and Judge Bennett concurred.

OPINION

DUNCAN, Circuit Judge:

In 2003, Gena Dunphy pleaded guilty to aiding and abetting the possession of crack cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). She was sentenced to 135 months imprisonment, the minimum sentence under the Sentencing Guidelines in effect at that time. In 2008, Dunphy moved the district court for a reduction of her sentence based on an amendment to the guidelines that effectively lowered the offense level with respect to offenses involving crack cocaine.

The district court reduced Dunphy's sentence to 108 months, the minimum available to her under the amended guidelines, but declined to grant a further reduction below the 108-month minimum on the ground that it lacked authority to do so. Dunphy timely appealed. Because the district court properly interpreted the limits of its authority, we affirm.

I.

Dunphy pleaded guilty in May of 2003 to a single count of aiding and abetting the possession of crack cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). At her sentencing hearing, the district court found, as stipulated by the parties, that she was responsible for over 150 grams of crack. Under the guidelines applicable at the time, that drug quantity produced a base offense level of 34. *See* U.S.S.G. § 2D1.1(c)(3) (2002). Adding two levels for possession of a firearm, and subtracting three levels

for acceptance of responsibility, the district court calculated Dunphy's total offense level at 33. With her category I criminal history, Dunphy's sentencing range was 135-168 months. The district court sentenced Dunphy at the bottom of that range to a term of 135 months of imprisonment. Dunphy did not appeal.

Several years later, the Sentencing Commission issued Amendment 706, which altered the drug quantity table set forth in U.S.S.G. § 2D1.1 to effectively lower the base offense level for offenses involving crack cocaine by two levels.[1] The Commission added Amendment 706 to the list in the U.S.S.G. § 1B1.10(c) policy statement that designates those guidelines amendments which may be applied retroactively.[2]

Based on these amendments, Dunphy moved in the district court for a reduction of her sentence pursuant to 18 U.S.C. § 3582(c)(2), which provides a limited exception to the rule barring a court from modifying a sentence once it has been imposed. Applying the amended drug quantity table to the quantity of crack attributable to Dunphy in 2003,

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[1] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, which also became effective November 1, 2007. Amendment 706 was incorporated through Amendment 713. Amendment 712, discussed below, concerns separate changes made to the U.S.S.G. § 1B1.10 policy statement.

[2] A guideline amendment may be applied retroactively only when expressly listed in U.S.S.G. § 1B1.10(c). *United States v. McHan*, 386 F.3d 620, 622 (4th Cir. 2004).

Dunphy's base offense level was reduced from 34 to 32. Applying the two-level firearm enhancement and three-level subtraction for acceptance of responsibility, Dunphy's total offense level became 31. This offense level yields an amended guideline range of 108-135 months, reduced from the 135-168 months applicable at her initial sentencing. The district court resentenced Dunphy to 108 months, the bottom of the amended guideline range.

Dunphy nevertheless requested that the district court grant a further reduction to a sentence below 108 months. She acknowledged that with respect to defendants who were originally sentenced within the guideline range, as she had been, the language of U.S.S.G. § 1B1.10(b)(2)(A) bars the district court from reducing the defendant's sentence to "a term that is less than the minimum of the amended guideline range." U.S.S.G. § 1B1.10(b)(2)(A); *see also* App. Note 3. She argued, however, that the § 1B1.10(b) mandatory restriction on the extent of the reduction was invalid for two reasons: (1) because, as a constitutional matter, *United States v. Booker*, 543 U.S. 220 (2005), held that the guidelines were advisory rather than mandatory; and (2) because, as a matter of statutory construction, § 1B1.10(b) was inconsistent with the requirement that the sentencing court apply the § 3553(a) factors. *See* J.A. 73-76.

The district court disagreed. It denied Dunphy's motion insofar as she sought a reduction below the minimum amended guideline range on the ground that it lacked such authority under § 3582(c)(2). J.A. 84-87. The court observed that § 3582(c) proscribes the modification of a term of imprisonment once it has

been imposed, except under narrow circumstances provided in the statute, and permits a reduction only if "consistent with applicable policy statements issued by the Sentencing Commission." J.A. 83-85 (quoting § 3582(c)(2)). The court further pointed to the directive in 28 U.S.C. § 994(u) that if the Commission reduces a sentencing range, it must determine the circumstances and the extent of the reduction. J.A. 84. Citing authority from other circuits as well, the district court concluded that *Booker* did not authorize courts to deviate below the level authorized by the Sentencing Guidelines and policy statements in the guidelines. J.A. 83-86.

This appeal followed.

II.

The district court's determination that it lacked authority to reduce Dunphy's sentence to a term below the amended guideline range is a question of law that we review de novo. *United States v. Legree*, 205 F.3d 724, 727 (4th Cir. 2000).

We begin our analysis with a consideration of the statutes and guidelines involved. The congressional directive in 28 U.S.C. § 994(u) provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment may be reduced." § 994(u). As the Supreme Court has explained with respect to this provision, "Congress has granted the Commission the unusual explicit power to

decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton v. United States,* 500 U.S. 344, 348 (1991) (*citing* § 994(u)) (emphasis omitted).

In 18 U.S.C. § 3582(c), Congress mandated that courts "may not modify a term of imprisonment once it has been imposed." § 3582(c). However, § 3582(c) allows for specified exceptions to this general rule. The exception relevant here authorizes a district court to reduce a defendant's term of imprisonment when the Commission has subsequently lowered his or her sentencing range and made that reduction retroactive. However, such sentence-reduction is authorized only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2).

Under the express statutory language of § 994(u) and § 3582(c)(2), the Commission's policy statements implementing the statute's authorization of retroactive sentence reductions are binding, just as the statutory restrictions on reductions below a mandatory minimum are binding. *See United States v. Walsh,* 26 F.3d 75, 77 (8th Cir. 1994) (holding that "Congress has made the policy statements set forth in § 1B1.10 the applicable law for determining whether a district court has the authority to reduce a sentence in this situation."). The guideline's policy statement in U.S.S.G. § 1B1.10, identifying the amendments which may be applied retroactively, further emphasizes the limited nature of the relief available under § 3582(c)(2). Subsection 1B1.10(a) provides, in relevant part:

> (1) In General. – In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment . . . , the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). . . .
>
> (3) Limitation. – [P]roceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing *of the defendant.*

U.S.S.G. § 1B1.10(a) (as amended by Amendment 712 effective March 3, 2008) (emphasis added).

Subsection 1B1.10(b)(l), in turn, specifies the mechanism for calculating the amended guideline range:

> [T]he court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute *only* the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced *and shall leave all other guideline application decisions unaffected.*

U.S.S.G. § 1B1.10(b)(1) (as amended by Amendment

712 effective March 3, 2008) (emphases added).

Subsection 1B1.10(b)(2)(A), which applies when a defendant (like Dunphy) received a within-guidelines sentence at her original sentencing, limits the extent of the reduction to the minimum of the amended guideline range. It states in pertinent part that "the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range." U.S.S.G. § 1B1.10(b)(2)(A). The guidelines commentary reiterates this explicit limitation on the extent of the reduction, stating:

> Under subsection (b)(2), the amended guideline range . . . limit[s] the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, *the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term provided by the amended guideline range* determined under subsection (b)(1).

U.S.S.G. § 1B1.10, App. Note 3 (as amended by Amendment 712 effective March 3, 2008) (emphasis added).

Moreover, proceedings under § 3582(c)(2) "do not

constitute a full resentencing of the defendant." U.S.S.G. § 1B1.10(a)(3); *see Legree*, 205 F.3d at 730 (holding that a motion pursuant to § 3582(c) "is not a do-over of an original sentencing proceeding" (citation omitted)); *see also United States v. McBride*, 283 F.3d 612, 615 (3d Cir. 2002) (holding that § 3582(c)(2) authorizes "a reduction of sentence" and not a "full resentencing"); *United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) (holding that § 3582(c)(2) "do[es] not contemplate a full *de novo* resentencing" (quotation and citation omitted)). Rather, § 3582(c)(2) and U.S.S.G. § 1B1.10 are narrow provisions that allow a limited reduction of sentence by the amount specified in an amendment, while prohibiting a complete reevaluation. *See, e.g., United States v. Hasan*, 245 F.3d 682, 685-86 (8th Cir. 2001) (en banc) (finding that a reduction below the amended guideline range is not permitted); *Bravo*, 203 F.3d at 781 (affirming that the district court "lacked jurisdiction to depart downward . . . to an extent greater than that authorized under Section 3582(c) based on the amended guideline provision"). In providing that sentencing reductions must be consistent with applicable policy statements, § 3582(c)(2) thus creates a jurisdictional bar to reducing sentences below the range authorized by the Commission. *See, e.g., United States v. Julien*, 550 F. Supp. 2d 138, 139-40 (D. Me. 2008).

III.

A.

Dunphy advances two arguments on appeal, which we consider in turn. First, she argues that limiting the extent of a § 3582(c)(2) sentencing reduction is the

functional equivalent of a mandatory application of the guidelines which *Booker* and *Kimbrough v. United States*, 128 S. Ct. 558 (2007), prohibit. However, this argument is unavailing.

In *Booker*, the Supreme Court concluded that the Sixth Amendment requires that the jury, not the judge, find the facts that establish the mandatory guideline range. The Court remedied that Sixth Amendment constitutional defect reflected in the guidelines by severing the provisions that made them mandatory. Because the guidelines are now advisory, the courts must *consider* the guidelines as well as the other factors in 18 U.S.C. § 3553(a) in selecting an appropriate sentence. *Booker*, 543 U.S. at 245-68; *see also Gall v. United States*, 128 S. Ct. 586, 594 (2007).

Nothing in *Booker*, however, expands the permissible extent of sentencing reductions under § 3582(c)(2). Even before *Booker*, the guidelines were not mandatory in § 3582(c) proceedings. Courts are not *required* to reduce a sentence. Section 3582(c)(2) merely provides that they "may" do so in certain circumstances. And even if a court does reduce a sentence, it is not required to do so to the full extent allowed by a retroactive guideline amendment. Instead, then, as now, courts are to "consider[ ] the factors set forth in § 3553(a) to the extent that they are applicable" and reduce the sentence "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." § 3582(c)(2). The § 3553(a) factors were always the guiding principle under § 3582(c)(2), with the limitation that a reduction must be in accord with the Commission's policy statements.

Booker thus had no direct effect on § 3582(c)(2). While it applied the now-familiar rule that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," *Booker,* 543 U.S. at 231 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 490 (2000)), such a rule has no application to proceedings under § 3582(c)(2), which can only decrease – not increase – the defendant's sentence.[3]

Booker's remedial holding is likewise inapplicable. *Booker applies to full sentencing hearings* – whether in an initial sentencing or in a resentencing where the original sentence is vacated for error. The *Booker* Court excised and severed the provision – 18 U.S.C. § 3553(b) – that made the guidelines mandatory in such sentencing proceedings. It also excised the related provision on appellate review, 18 U.S.C. § 3742(e). "With these two sections excised (and statutory cross-references to the two sections consequently invalidated)," the Court held, "the remainder of the Act satisfies the Court's constitutional requirements." *Booker,* 543 U.S. at 259. Section 3582(c)(2) contains no cross-reference to § 3553(b) and therefore was not affected by *Booker.* Nor is there anything else in *Booker* that directly addresses § 3582(c) proceedings.

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[3] Further, the limits § 3582(c)(2) and U.S.S.G. § 1B1.10 impose on the extent of reductions are, at most, the equivalent of mandatory minimum sentences, which the Sixth Amendment permits within an otherwise-authorized sentencing range. *See Harris v. United States,* 536 U.S. 545, 566 (2002).

The Court in *Booker* did apply its advisory guidelines remedy to full sentencing hearings in which no Sixth Amendment violation existed, concluding that Congress would not have wanted the guidelines to be mandatory in some contexts and advisory in others. *Id.* at 266. The Court rested its decision on two observations; the fact that neither applies to reduction proceedings under § 3582(c)(2) reinforces our conclusion regarding the limits on the scope of that provision. First, the Court observed that Congress would not have wanted to "impose mandatory . . . limits upon a judge's ability to *reduce* sentences," but not to "impose those limits upon a judge's ability to *increase* sentences." *Id.* Congress would not have wanted such "one-way lever[s]." *Id.* But Congress clearly intended § 3582(c)(2) to be a "one-way lever" insofar as it gives the sentencing court the option to leave a defendant's sentence alone or to reduce it, but does not permit the court to increase the sentence.

Second, the *Booker* Court observed that making the guidelines partially advisory and partially mandatory in federal sentencings would create significant "administrative complexities." *Id.* However, given the limited scope of a proceeding under § 3582(c)(2), the "administrative complexities" that led the Supreme Court to require all guideline provisions to be advisory *at full sentencing proceedings* are not present here. *Id.* On the contrary, a holding that *Booker* requires full resentencings whenever a guideline is made retroactive would create administrative complexities and vastly expand the scope of a sentencing reduction proceeding under § 3582(c)(2).

Albeit in a slightly different context, the Third Circuit has rejected the notion that *Booker,* by rendering the guidelines advisory, overrides the requirements of § 3582(c). In *United States v. Wise*, the defendants argued that they could gain relief under the crack amendments immediately, even though the amendments had not yet become effective. 515 F.3d 207 (3d Cir. 2008). The Court held that the defendants could not obtain immediate relief under § 3582(c)(2) because § 1B1.10(c) did not yet list the relevant amendments. *Id.* at 221. The Court stated:

> Some may argue that, because the Guidelines are no longer mandatory, defendants need not wait to apply for relief under § 3582(c)(2). That fundamentally misunderstands the limits of *Booker*. Nothing in that decision purported to obviate the congressional directive on whether a sentence could be reduced based on subsequent changes in the Guidelines. As we have stated before, '[t]he language of the applicable sections could not be clearer: the statute directs the Court to the policy statement, and the policy statement provides that an amendment not listed in subsection (c) may not be applied retroactively pursuant to 18 U.S.C. § 3582(c)(2).'

Id. at 221 n.11 (quoting *United States v. Thompson*, 70 F.3d 279, 281 (3d Cir. 1995)). Although the guidelines are no longer mandatory, "that does not render optional" the statutory directives regarding their

application. *See id.* at 220.

Dunphy, however, relies on the decision in *United States v. Hicks* in which the Ninth Circuit held that reducing a sentence below the amended guideline range was permissible under § 3582(c). 472 F.3d 1167 (9th Cir. 2007). *Hicks* involved a § 3582(c) sentence reduction motion, based on a retroactive guideline amendment related to possession of firearms, at a time when a prior version of the § 1B1.10 policy statement was in effect. The *Hicks* court found that reducing a sentence below the amended guideline range was consistent with that pre-Amendment 712 version of § 1B1.10. *Id.* at 1172-73. In that respect, the *Hicks* court noted that "[t]he policy statements are silent on the manner in which the modified ranges should be used." *Id.*

However, the post-Amendment 712 version of the policy statement in § 1B1.10, applicable in the instant case, expressly provides that a § 3582(c)(2) proceeding "do[es] not constitute a full resentencing of the defendant," U.S.S.G. § 1B1.10(a)(3), and it explicitly limits the extent of the authorized reduction to "the minimum of the amended guideline range," U.S.S.G. § 1B1.10(b)(2)(A). Thus, the *Hicks* court was not confronted with the situation presented here, where reducing a sentence below the amended guideline range would be directly inconsistent with an applicable policy statement of the Commission.

Hicks, however, went further and concluded that even if the applicable policy statements had been inconsistent with reducing a sentence below the amended guideline range, those policy statements

would have to "give way." 472 F.3d at 1173. In *Hicks*, the court's view was that limiting the extent of a § 3582(c)(2) sentencing reduction would amount to a mandatory application of the guidelines that is prohibited by *Booker*. *Id.* We find the *Hicks* analysis to be flawed because it fails to consider two marked characteristics of a § 3582(c)(2) proceeding, which we discussed above: (1) this proceeding allows only for downward adjustment and (2) this proceeding is not a full resentencing hearing.[4]

In an unpublished decision in *United States v. Outlaw,* this court rejected the defendant's effort to obtain a further reduction under *Booker.* 281 F. App'x 220 (4th Cir. 2008). This court held that "the relief Outlaw seeks is unavailable under § 3582(c)(2)," citing *United States v. Moreno,* 421 F.3d 1217, 1220 (11th Cir. 2005), for the proposition that "*Booker* is inapplicable to § 3582(c) motions." *Outlaw,* 281 F. App'x at 220.

Given that *Booker* does not apply to defendants whose sentences were final when *Booker* was decided, applying *Booker* in § 3582(c) proceedings would create patent inequity among convicted defendants.[5] Section

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[4] In a recent decision, the Tenth Circuit also rejected the argument in *Hicks*. *United States v. Rhodes,* 549 F.3d 833 (10th Cir. 2008). The Tenth Circuit in *Rhodes* held, as we do here, that in resentencing a defendant under 18 U.S.C. § 3582(c)(2) because of the retroactive amendment of the guidelines regarding crack cocaine offenses, a district court lacks the authority to impose a sentence that is less than the minimum of the amended guideline range. *Id.* at 841.

[5] We note that the conclusion that *Booker* does not apply in proceedings under § 3582(c)(2) is consistent with the courts of

3582(c)(2) was meant only to permit courts to reduce certain defendants' sentences to account for retroactive guideline amendments. To grant these defendants a further reduction that is not afforded to similarly situated defendants would increase the unwarranted sentencing disparities Congress sought to reduce in the Sentencing Reform Act.[6]

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appeals' uniform holdings that defendants whose convictions are final have no right to resentencing under *Booker* on collateral review under 28 U.S.C. § 2255. *See Cirilo-Munoz v. United States*, 404 F.3d 527, 532-33 (1st Cir. 2005); *Guzman v. United States*, 404 F.3d 139, 141 (2d Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 613-16 (3d Cir. 2005); *United States v. Morris*, 429 F.3d 65, 66-67 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 602-05 (5th Cir. 2005); *Humphress v. United States*, 398 F.3d 855, 860-63 (6th Cir. 2005); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *Never Misses A Shot v. United States*, 413 F.3d 781, 783-84 (8th Cir. 2005); *United States v. Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005); *United States v. Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867-68 (11th Cir. 2005); *In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007). It would be incongruous if courts interpreted § 3582(c)(2) to trigger a full *Booker* resentencing when it (1) provides for much more limited relief than § 2255, (2) concerns only sentence reductions, and (3) raises no Sixth Amendment concerns.

[6] If we were to adopt Dunphy's argument, for instance, a defendant convicted of possession of a large quantity of powder cocaine and a small quantity of crack cocaine could be eligible for full resentencing, even if the quantity of powder cocaine was sufficient to yield the original base offense level (so that the retroactive crack cocaine amendments alone would not yield any reduction). The same situation would arise whenever an offense that accompanied the crack cocaine offense was sufficient to yield the original base offense level. Similarly, a full resentencing for those eligible for potential reduction under retroactive amendments would mean that they alone among those convicted would presumably have the opportunity to bring events that happened subsequent to their original sentencing to bear in their

Dunphy also cites *Kimbrough* for the propositions that offense levels based on crack cocaine quantity specifically are advisory and that, in deciding whether to depart downward from the guideline range, courts may take into account the disparity between sentencing for powder cocaine and crack cocaine. *See* Appellant Br. at 12-13. However, nothing in *Kimbrough* undercuts the district court's judgment because the Court in *Kimbrough* did not address § 3582(c) proceedings.

B.

In addition to her *Booker* argument, Dunphy argues that the express limitation on the extent of her sentence reduction established by U.S.S.G. § 1B1.10(b) should be disregarded as a matter of statutory interpretation. Dunphy claims that the language in § 3582(c)(2) directing the court to "consider the factors in § 3553(a) to the extent that they are applicable" mandates a full resentencing in every case and precludes the Commission from setting any limitation on the extent of a § 3582(c) reduction. *See* Appellant Br. 10. Any limitation set by the Commission would, in Dunphy's view, conflict with the mandate that the court consider the § 3553(a) factors. We disagree.

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resentencing. Or, again, those eligible for potential reduction under retroactive amendments would have the opportunity to represent original mitigating factors in the hopes that a different judge would be more lenient than the original sentencing judge. These illustrations also make apparent the additional administrative complexities that would accompany a holding that would transform a § 3582(c)(2) proceeding into a full re-sentencing hearing.

Contrary to Dunphy's argument, the reference in § 3582(c) to consideration of the § 3553(a) factors does not invalidate the limitations in the U.S.S.G. § 1B1.10(b) policy statement. Rather, the reference in § 3582(c) is implemented through the U.S.S.G. § 1B1.10 requirement that a court consider the § 3553(a) factors (including the guidelines) in determining: (1) whether a reduction is warranted and (2) the extent of such reduction. U.S.S.G. § 1B1.10, App. Note 1(B)(i).[7] In that manner, consideration is given to the § 3553(a) factors without turning a § 3582(c) hearing into a full sentencing hearing and without disregarding the § 3582(c) requirement that a reduction be consistent with the Commission's policy statements. As the Eighth Circuit held in *Hasan*:

> The language of the statute, 18 U.S.C. § 3582(c)(2), is clear. The factors set forth in § 3553(a) and the applicable policy statements are to be considered only when making the decision whether to reduce a term of imprisonment as a result of the Sentencing Commission's lowering of the sentencing range. The statute does not say that the court may reduce the term of imprisonment below the amended sentencing range or that the § 3553(a) factors

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[7] App. Note 1(B)(i) to U.S.S.G. § 1B1.10 provides:

> In general. – Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction of the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in [U.S.S.G. § 1B1.10(b)].

> or the applicable policy statements should be considered for such an additional reduction.

Hasan, 245 F.3d at 685.

The district court here expressly considered the § 3553(a) factors in making the determination (1) that a reduction of Dunphy's term of imprisonment was warranted and (2) that the extent of the reduction for Dunphy should be to the minimum of the amended guideline range. It properly did so in accord with the limits described in U.S.S.G. § 1B1.10(b), refusing to go below the minimum of the amended guideline range.[8] J.A. 82-83.

Dunphy also argues that the § 1B1.10(b) policy statement and accompanying commentary are "not the type of policy statement Congress had in mind in § 3582(c)(2)."[9] Appellant Br. 15. To support her argument, Dunphy references the Supreme Court's statement in *Braxton*, 500 U.S. at 348, that "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given

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[8] Further, Dunphy's proposed interpretation of § 3582(c) ignores the language in that statute immediately following the reference to 3553(a) – language that expressly conditions the availability of any reduction on consistency with the Commission's applicable policy statements.

[9] Dunphy would apparently have this Court give full effect under § 3582(c) to the portion of § 1B1.10 designating Amendment 706 as retroactive, *see* U.S.S.G. § 1B1.10(c), but conveniently ignore the remainder of the same policy statement.

retroactive effect, 28 U.S.C. § 994(u)." Appellant Br. 15. However, as Dunphy's quotation demonstrates, far from supporting Dunphy's argument, *Braxton* explicitly recognizes the Commission's power under 28 U.S.C. § 994(u) to decide *whether* an amendment will be given retroactive effect and to decide the *extent* of that retroactive effect. *See Braxton,* 500 U.S. at 348. The Commission has exercised that power in limiting the extent of § 3582(c) reductions in § 1B1.10(b).

Dunphy further argues that § 1B1.10(b) is invalid under 28 U.S.C. § 994(a)(2). Appellant Br. 17-18. However, § 994(a)(2) expressly authorizes such policy statements, as it describes the duty of the Commission to promulgate and distribute general policy statements regarding how the guidelines ought to be applied or implemented, "including the appropriate use of . . . the sentence modification provisions set forth in section[ ] . . . 3582(c) of title 18." § 994(a)(2). Nothing in § 994(a)(2) bars the Commission from issuing a policy statement regarding the implementation of sentence reductions under § 3582(c), as it has done in U.S.S.G. § 1B1.10.

Dunphy notes that the Commission described Amendment 706 as an interim measure to alleviate some of the problems associated with the 100-to-1 powder/crack drug quantity ratio. But that does not make the amended drug-quantity guideline invalid in the present case. *See* U.S.S.G. § 2D1.1(c). Nor does the Commission's description of Amendment 706 as an interim measure invalidate § 1B1.10(b), the policy statement that, in conjunction with § 3582(c), controls the retroactive effect of lowered guidelines.

IV.

When a sentence is within the guidelines applicable at the time of the original sentencing, in an 18 U.S.C § 3582(c) resentencing hearing, a district judge is not authorized to reduce a defendant's sentence below the amended guideline range. Consequently, the district court's order is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF WEST VIRGINIA
MARTINSBURG

UNITED STATES OF AMERICA,	Criminal Action No. 3:02-CR-45
Plaintiff,	(BAILEY)
v.	
GENA MARIE DUNPHY,	
Defendant.	

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR REDUCED SENTENCE PURSUANT TO 18 U.S.C. § 3582(c)

Pending before this Court is Defendant's Motion for Reduced Sentence Pursuant to 18 U.S.C. § 3582(c) (Doc. 259). In her motion, the defendant seeks a sentence reduction greater than the two-level guideline reduction provided by the amendments to the Sentencing Guidelines. This Court will deny the motion insofar as it seeks a reduction beyond a level consistent with the Sentencing Guidelines.

This is a motion for a reduction in terms of imprisonment under 18 U.S.C. § 3582(c)(2), which provides that a "court may not modify a term of

imprisonment once it has been imposed except that . . . in the case of a defendant who has been sentenced to a term of imprisonment based upon a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent they are applicable, if such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission."

In considering reductions under § 3582(c)(2), neither the appointment of counsel nor a hearing is required. *United States v. Legree*, 205 F.3d 724 (4th Cir. 2000). As noted by the Fourth Circuit in *Legree*, "[a] motion pursuant to § 3582(c) 'is not a do-over of an original sentencing proceeding where a defendant is cloaked in rights mandated by statutory law and the Constitution.'" 205 F.3d at 730, quoting *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir.), *cert. denied,* 528 U.S. 1023 (1999).

"In determining the amended guideline range, this court will only make changes to the corresponding guideline provision, which is affected by Amendment [706], and all other guideline decisions will remain unaffected." *United States v. Gilliam*, 513 F. Supp. 2d 594, 597 (W.D. Va. 2007), citing U.S.S.G. § 1b1.10.

In this case, despite the fact that the appointment of counsel is not required, the defendant's interests are represented by the Federal Public Defender, who filed the motion on defendant's behalf.

In determining to grant the sentence reduction, this Court has considered the factors set forth in 18 U.S.C. § 3553(a) to determine (1) whether a reduction in sentence is warranted; and (2) the extent of such reduction, but only within the limits described in U.S.S.G. § 1B1.10(b).

This Court has also considered the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining (1) whether a reduction in sentence is warranted; and (2) the extent of such reduction, but only within the limits described in U.S.S.G. § 1B1.10(b).

The sentencing judge found a base offense level of 34, plus two levels for possession of a firearm and less three levels for acceptance of responsibility, for a total offense level of 33. With a criminal history category of 1, the guidelines provided a sentencing range of 135-168 months. The Judge sentenced the defendant to a sentence of 135 months.

Under the retroactive 2007 crack guideline amendments, the defendant's base offense level would be 32, plus two levels for possession of a firearm and less three levels for acceptance of responsibility, resulting in a total offense level of 31. With a criminal history category of 1, the guideline range would be 108-135 months. Accordingly, this Court will reduce the defendant's sentence to 108 months.

All other provisions of the original sentence shall remain in effect.

This defendant has requested a full re-sentencing consistent with *United States v. Booker*, 543 U.S. 220 (2005). This Court denies such relief, believing that such a re-sentencing is not contemplated by 18 U.S.C. § 3582(c)(2) and U.S.S.G. § 1B1.10.

Under 18 U.S.C. § 3582(c)(2), a district court may not modify a term of imprisonment once it has been imposed, except under narrow circumstances provided in the statute. One of these exceptions is 18 U.S.C. § 3582(c)(2), which states as follows:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, *if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission*.

(Emphasis added).

As noted by the District Court in *United States v. Cruz*, 2008 WL 539216, *4 (E.D.N.Y. Feb. 27, 2008), "18 U.S.C. § 3582(c)'s requirements are jurisdictional. *See United States v. Smith*, 438 F.3d 796, 799 (7th Cir. 2006) (§ 3582(c) limits the substantive authority of the district court and is accordingly a real 'jurisdictional'

rule); *see also United States v. Thomas*, 135 F.3d 873, 876 (2d Cir. 1998) ('Congress has imposed stringent limitations on the authority of courts to modify sentences, and courts must abide by those strict confines'); *United States v. Silva*, 337 F. Supp. 2d 573, 575-76 (S.D.N.Y. 2004) (describing § 3582(c) as jurisdictional and declining to reduce defendants' sentences due to lack of jurisdiction); *United States v. Gagot*, 2008 WL 435496, at *1 (D. Mass. Feb. 19, 2008) (discussing 18 U.S.C. § 3582(c)(2) and noting Congress can circumscribe district court's jurisdiction 'as it sees fit')."

28 U.S.C. § 994(u) provides that "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, *it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment may be reduced.*" (Emphasis added.)

Pursuant to USSG § 1B1.10(b)(2), the court "shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range . . ." unless the "original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing . . . ."

A number of jurisdictions that have considered this issue have also found that *Booker* does not apply to motions for reduction of sentence under 18 U.S.C. § 3582(c)(2). *See United States v. Hudson*, 242 F. App'x 16 (4th Cir. 2007) (it is not clear error or abuse

of discretion to refuse to apply *Booker* to a sentence reduction under § 3582(c)(2)); *United States v. Rolle*, 163 F. App'x 245 (4th Cir. 2006) ("Rolle sought relief based on the Supreme Court's decisions in [*Booker*]. The relief Rolle seeks is unavailable under § 3582(c)(2)."); *United States v. Rodriguez-Pena*, 470 F.3d 431, 433 (1st Cir. 2006) (defendant's contention that a § 3582(c) reduction was warranted under *Booker* was "roundly rejected."); *United States v. Price*, 438 F.3d 1005, 1007 (10th Cir. 2006) ("*Booker* does not provide a basis for a sentence reduction under § 3582(c)."); *United States v. Moreno*, 421 F.3d 1217, 1220 (11th Cir. 2005) ("*Booker* is a Supreme Court decision, not a retroactively applicable guideline amendment by the Sentencing Commission. Therefore, *Booker* is inapplicable to § 3582(c)(2) motions."); *United States v. Sanchez*, 140 F. App'x 409, 410 (3d Cir. 2005) ("[Section] 3582(c)(2) permits a reduction of sentence as a result of a subsequent amendment of the guidelines by the Sentencing Commission, not based on a decision of the Supreme Court that is unrelated to an actual amendment of the guidelines."); *United States v. Privette*, 129 F. App'x 897, 899 (5th Cir. 2005) ("*Booker* is inapplicable to review the denial of Privette's § 3582(c)(2) motion. By its plain language, § 3582(c)(2) is not implicated by a decision of the Supreme Court that is unrelated to an actual amendment of the guidelines."); *United States v. Frye*, 2008 WL 1816403 (W.D. Va. April 21, 2008) ("*Booker* and its progeny are inapplicable to motions to reduce sentence under § 3582(c)(2)."); *United States v. Roberson*, 2008 WL 2020209 (M.D. Pa. May 8, 2008) ("we disagree with [*United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007)]'s ruling that *Booker* applies to resentencing under section 3582(c)(2)."); *United States*

v. Julien, 2008 WL 1933340 (D. Maine May 2, 2008) ("the Court does not find *Hicks* to be persuasive regarding the application of *Booker* to all sentencing reductions done pursuant to § 3582(c)(2)."); *Montes v. United States*, 2008 WL 906079, at *2 (S.D.N.Y. April 3, 2008) (holding that *Booker* and *Kimbrough* do not apply to § 3582(c)(2) proceedings and that "[a]ny reduction . . . can be no greater than that provided by the amendments to the Sentencing Guidelines"); *United States v. Waller*, 2008 WL 822118 (E.D. Mo. March 26, 2008) ("the maximum relief available to the defendant is the two-level offense level reduction authorized by the amendment to § 2D1.1"); *United States v. Hall*, 2008 WL 824234, at *1 (N.D. Iowa March 24, 2008) (concluding that *Booker* does not apply to § 3582(c)(2) proceedings); *United States v. Cruz*, 2008 WL 539216 (E.D.N.Y. Feb. 27, 2008) ("*Booker* does not apply to § 3582(c)(2) proceedings.").

In addition, in *United States v. Taylor*, 414 F.3d 528 (4th Cir. 2005), the Fourth Circuit held that where the government filed a Rule 35(b) motion to reduce a pre-*Booker* sentence, there was no right to consideration of the *Booker* factors in considering the Rule 35(b) motion.

The Court agrees with the above authorities that the courts may not apply *Booker* in a crack re-sentencing to deviate below the level authorized by the sentencing guidelines and policy statements.

For the reasons stated above, the Defendant's Motion for Reduced Sentence Pursuant to 18 U.S.C. § 3582(c)(2) (Doc. 259) is GRANTED IN PART AND DENIED IN PART. The defendant shall be re-

sentenced to a term of 108 months.[10] The defendant's request for a further reduced sentence pursuant to *Booker* and *Kimbrough* is DENIED.

It is so ORDERED.

The Clerk is hereby directed to transmit copies of this Order to all counsel of record herein.

DATED: May 28, 2008.

/s/
JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

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[10] A separate Order is filed herewith.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
WEST VIRGINIA

UNITED STATES OF AMERICA,

v.

GENA MARIE DUNPHY

ORDERING REDUCING TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE PURSUANT TO USSG 1B1.10 AND USSG 2D1.1

Date of Original Judgment: May 8, 2003
(Or Date of Last Amended Judgment)

Case Number:
3:02-CR-45-1
USM Number:
10981-055

Brian C. Crockett
Defendant's Attorney

The defendant having been previously sentenced to a term of 135 months of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission and upon motion of the:

√ defendant,
☐ Director of the Bureau of Prisons,
☐ Court,

IT IS ORDERED, after considering the factors set forth in 18 U.S.C. § 3553(a), that the defendant's term of imprisonment be reduced, as follows:

Original Sentencing Range:	Reduced Sentencing Range:
Previous Offense Level: 33	New Offense Level: 31
Previous Criminal History Category: I	New Criminal History Category: I
Previous Guideline Range: 135 to 168 months	New Guideline Range: 108 to 135 months

New Term of Imprisonment:
108 months

The Court finds that the reduction is consistent with the applicable policy statements issued by the Sentencing Commission. All other provisions of the original sentence remain intact.

IT IS SO ORDERED.

/s/
Signature of Judge

5-28-2008
Date

Chief District Judge John Preston Bailey
Name of Judge

APPENDIX D

UNITED STATES CODE
Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 227. Sentences
Subchapter D. Imprisonment

§ 3582. Imposition of a sentence of imprisonment

(a) FACTORS TO BE CONSIDERED IN IMPOSING A TERM OF IMPRISONMENT.—The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

(b) EFFECT OF FINALITY OF JUDGMENT.—Notwithstanding the fact that a sentence to imprisonment can subsequently be—

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been

made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

(d) INCLUSION OF AN ORDER TO LIMIT CRIMINAL ASSOCIATION OF ORGANIZED CRIME AND DRUG OFFENDERS.—The court, in imposing a sentence to a term of imprisonment upon a defendant convicted of a felony set forth in chapter 95 (racketeering) or 96 (racketeer influenced and corrupt organizations) of this title or in the Comprehensive Drug Abuse

Prevention and Control Act of 1970 (21 U.S.C. 801 et seq.), or at any time thereafter upon motion by the Director of the Bureau of Prisons or a United States attorney, may include as a part of the sentence an order that requires that the defendant not associate or communicate with a specified person, other than his attorney, upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise.

APPENDIX E

United States Sentencing Commission
Guidelines Manual (November 2008)
Chapter 1. Introduction, Authority, and General Application Principles
Part B. General Application Principles

§1B1.10. Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if—

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does

not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.—

(A) In General.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the

amended guideline range determined under subdivision (1) of this subsection.

(B) Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

Commentary

Application Notes:

1. Application of Subsection (a).—

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection

(b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a

term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.— If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently

been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of

such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

* So in original. Probably should be "to fall above the amended guidelines".

(2)

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No. 08-1185

In the Supreme Court of the United States

GENA MARIE DUNPHY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 7-26) that Court should grant certiorari to resolve the circuit conflict on the question whether the holding of *United States* v. *Booker*, 543 U.S. 220 (2005), which remedied the constitutional defect in the Sentencing Guidelines by rendering them advisory, applies in a sentence modification proceeding under 18 U.S.C. 3582(c). This Court has received several other petitions raising the same basic claim. As the government has explained in its brief in opposition to the first of those petitions, see *United States* v. *Rhodes*, No. 08-8318 (filed Mar. 27, 2009),[1] although the courts of appeals are divided on this issue, this Court's review of that issue is not currently warranted.

[1] We have served petitioner with a copy of the government's brief in opposition in *Rhodes*.

Six of the seven courts of appeals to consider the issue have held (correctly, in the government's view) that *Booker* does not apply in sentence modification proceedings under Section 3582(c). See U.S. Br. in Opp. at 15-16, *Rhodes* (No. 08-8318) (citing cases). Although the Ninth Circuit's decision in *United States* v. *Hicks*, 472 F.3d 1167 (2007), is inconsistent with these decisions, *Hicks* is the subject of a pending government appeal in *United States* v. *Fox*, No. 08-30445 (9th Cir. filed Nov. 21, 2008). On March 13, 2009, the government filed its opening brief in the Ninth Circuit in *Fox*, and on April 13, 2009, the government filed a petition for an initial en banc review urging the Ninth Circuit to overrule its decision in *Hicks*. If the court of appeals grants the government's petition and agrees that *Hicks* should be overruled, the current circuit conflict will disappear. If the court of appeals denies the government's petition (or grants the petition and reaffirms *Hicks*), the government would retain the option of seeking this Court's review at that time. The pendency of the proceedings in *Fox*, therefore, renders this Court's review of the issue premature.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[2] The government waives any further response to the petition unless this Court requests otherwise.

127 (3)

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The government acknowledges, in its Ninth Circuit brief to which its Brief in Opposition refers, that the question presented here is one of "exceptional importance" on which "[t]here is an overriding need for national uniformity." Gvt. Pet. for Initial Hearing En Banc, *United States v. Fox,* Ninth Cir. No. 08-30445. The government also concedes that the circuits are currently split on the issue. Opp. 1. And the government does not dispute that this case is an ideal vehicle for resolving the conflict: Dunphy is a prime candidate for a below-Guidelines sentence, and her new within-Guidelines sentence depends on factual findings that violate the rules laid down in *United States v. Booker*, 543 U.S. 220 (2005), to the extent that decision applies to Section 3582 proceedings. *See* Pet. for Cert. 14-21.

The only question, therefore, is whether this Court should deny certiorari to wait and see whether the Ninth Circuit grants the government's petition for hearing en banc in *Fox* and decides to overrule its decision in *United States v. Hicks,* 472 F.3d 1167 (9th Cir. 2007) – or presumably to see whether any other circuit follows *Hicks.* The answer, for two reasons, is no.

First, the Fourth Circuit and other courts of appeals are wrong in holding that *Booker* does not apply to new sentences imposed in Section 3582 proceedings. The petition for certiorari explains why that is so. *See* Pet. for Cert. 15-26. And nothing in the government's brief in opposition in *Rhodes v. United States*, No. 08-8318, which the government incorporates here by reference, responds to the

petition's arguments. Instead, that brief is virtually a carbon copy of the Fourth Circuit's opinion (which itself simply parroted the brief the government filed in that court).

Perhaps the most telling example of the government's lack of any real argument on the merits is its proclamation that "18 U.S.C. 3582(c)(2) and U.S.S.G. § 1B1.10 authorize a narrowly focused proceeding in which a court has the authority to reduce a defendant's sentence only to the bottom of the amended Guidelines range." *Rhodes* Opp. 10. For starters, a court imposes an entirely new sentence in a Section 3582 proceeding; it does not "reduce" anything. *See* Pet. for Cert. 5-6, 17. More fundamentally, the question arises how such a proceeding, in the government's words, is "narrowly focused." It is not narrowly focused in terms of the information the sentencing judge is supposed to consider. The law directs the judge to consider all of the ordinary sentencing factors listed in 18 U.S.C. § 3553(a), and then some. *See* Pet. for Cert. 17. The only way that a Section 3582 proceeding differs from any other proceeding in which a court imposes a new sentence is that the Guidelines in a Section 3582 proceeding require the judge to treat the applicable sentencing range as binding. But that is exactly why *Booker* comes into play. All of the circuits that have ruled otherwise are simply buckling, in yet another round of litigation, to the government's refusal to come to grips with *Booker*.[1]

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[1] For previous iterations of this phenomenon, see *Nelson v. United States*, 129 S. Ct. 890 (2009) (per curiam) (reversing

Second, even if there were some doubt about the proper resolution of this issue, it would not make sense to await the Ninth Circuit's resolution of *Fox*. It will take that court several months or more to decide whether to take the issue en banc. In the unlikely event that it does grant the government's motion for an initial hearing en banc, it would take several more months (maybe years) to decide the case. It then would take this Court several more months to review that decision on certiorari and potentially on the merits. Meanwhile, petitioner and thousands of others like her in other circuits would languish in prison. Their current proceedings would either become final or – in what would be more appropriate under the circumstances – this Court will need to hold all of their petitions pending the Ninth Circuit's decisions.

It would be far better to resolve this extremely important issue now, once and for all. Not only would prisoners benefit from a prompt resolution of the issue, but a prompt resolution would be much better than requiring courts across the country to continue grappling with the issue and for lawyers on both sides to pour resources into the subject for years to come.

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court of appeals' decision treating the Guidelines as unduly binding); *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam) (same); *Moore v. United States*, 129 S. Ct. 4 (2008) (per curiam) (same); *Gall v. United States*, 128 U.S. 591 (2007) (same); *Kimbrough v. United States*, 128 U.S. 558 (2007) (same); *Rita v. United States*, 551 U.S. 338 (2007) (same).

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for certiorari, the petition should be granted.

Respectfully submitted,

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Respondent.

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation of indigent defendants in federal criminal prosecutions provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership includes attorneys and support staff of Federal Defender offices. One of the NAFD's missions is to file *amicus curiae* briefs to ensure that the position of indigent defendants in the criminal justice system is adequately represented. The instant case presents an issue of great importance to criminal defendants, including many indigent defendants represented by counsel in Federal Defender offices across the country: Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to 18 U.S.C. § 3582 because of a retroactive amendment to the Sentencing Guidelines. In the interest of its clients, the NAFD asks this Court to grant certiorari on the issue presented in this case.[1]

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[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Sup. Ct. R. 37.2(a). No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the NAFD or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court has repeatedly held that district courts must treat the Federal Sentencing Guidelines as advisory and impose sentences on defendants based on consideration of all of the factors set forth in 18 U.S.C. § 3553(a). Thousands of federal inmates are eligible for reduced terms of imprisonment under 18 U.S.C. § 3582(c)(2) as a result of the recent retroactive amendment to the Guidelines that reduced, but did not eliminate, the unwarranted disparity in the Sentencing Guidelines' treatment of crack and powder cocaine offenses. But within some judicial circuits, including the Fourth Circuit, these defendants are being resentenced pursuant to mandatory, amended guidelines ranges. Binding application of the Guidelines improperly limits the potential sentence reductions available to defendants in such jurisdictions. Courts in jurisdictions where the Guidelines are treated as advisory in Section 3582 proceedings have employed discretion in appropriate cases to impose sentences outside the amended Guidelines range. This disparity in treatment is unjust: The thousands of defendants in identical circumstances in other jurisdictions should have the same opportunity to receive sentences that reflect full consideration of all relevant § 3553(a) factors.

Not only is mandatory application of the Sentencing Guidelines in Section 3582 resentencings unjust and inconsistent with this Court's recent holdings, but the question of the interaction between retroactive amendments to the Guidelines and this Court's decision in *United States v. Booker*, 543 U.S.

220 (2005), is likely to recur and affect thousands more defendants in the future. The United States Sentencing Commission has made 27 retroactive amendments to the Guidelines, in some instances based on evidence of unwarranted disparities in sentences that took years to come to light. Future retroactive amendments will present the same question of the proper weight to accord the Guidelines on resentencing. The Court should take this opportunity to resolve the issue.

ARGUMENT

I. This Question Affects Thousands of Defendants Who Currently Await Resentencing And Are Subject To Disparate Sentencing Regimes In Different Federal Districts And Is Likely To Recur.

Thousands of federal inmates remain eligible for significantly reduced terms of imprisonment in resentencing proceedings conducted pursuant to 18 U.S.C. § 3582(c)(2) based on recent retroactive changes to the Federal Sentencing Guidelines that reduced, but did not eliminate, the unwarranted disparity in the Guidelines' treatment of crack cocaine and powder cocaine. Since Amendment 706 to the Guidelines reduced the crack-to-powder cocaine ratio below 100:1,[2] and Amendment 713

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[2] The amendment reduced by two levels the offense level corresponding to particular crack quantities. This created widely-varying ratios between crack and powder cocaine, ranging from 25:1 to 80:1, depending on the offense level. *See* James Egan & Molly Roth, *Good Math to Fight the Bad Math: Applying the Commission's Lowest Accepted*

made that change retroactive, thousands of defendants convicted of offenses relating to the distribution of crack cocaine have had their sentences reduced by an average of 24 months pursuant to the amended guidelines ranges. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT, March 2009, tbl.8 [hereinafter MARCH 2009 REPORT]. But many eligible defendants have yet to seek modified sentences under § 3582(c)(2), including many who stand to gain the most from resentencings. Moreover, many district courts, including the one that resentenced the petitioner below, have been precluded from considering all of the 18 U.S.C. § 3553(a) factors that this Court has repeatedly held district courts must consider in imposing sentence, and have instead been required to treat the amended guidelines ranges as binding.

A. Thousands Of Defendants Remain Eligible For Meaningful Reductions In Their Sentences.

The U.S. Sentencing Commission's data indicates that thousands of defendants remain eligible for resentencing under 18 U.S.C. § 3582(c)(2) as a result of the retroactive revisions to the crack Guidelines. Many others have sentences currently on appeal.

Ratios to All Offense Levels, CHAMPION (Apr. 2008), at 1 & n.3; Brian T. Yeh & Charles Doyle, *Sentencing Levels for Crack and Powder Cocaine: Kimbrough v. United States and the Impact of* United States v. Booker, CONG. RES. SERV. (Jan. 2009), at 14 & n.111.

In October 2007, the Sentencing Commission estimated that 19,500 defendants would be eligible for sentence reductions. Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 4-5 (Oct. 3, 2007), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf [hereinafter Impact Memorandum]. That estimate, however, did not include defendants sentenced prior to fiscal year 1992, or after the third quarter of fiscal year 2007. From March 3, 2008, when Amendment 706 became retroactive, through March 5, 2009, over 19,000 defendants applied for resentencing, and over 13,000 defendants have had their motions granted. MARCH 2009 REPORT, at tbl.1. More than 3,000 of the defendants whose motions have been denied, however, were not previously identified by the Sentencing Commission as eligible to seek a sentencing reduction, and thus were not included in the Commission's estimate of 19,500 defendants. *Id.* at tbl.5, n.1. Furthermore, nearly 500 of the applicants for sentence reductions were originally sentenced between fiscal years 1989 and 1991 or in fiscal year 2008, and so were also not accounted for in the Sentencing Commission's 2007 estimate. *Id.* at tbl.3. Put simply, the Commission originally estimated that 19,500 defendants would be eligible, and a similar number (19,000) have already applied. But several thousand of those who have applied were not among the 19,500 believed to be eligible, and several thousand of those believed to be eligible have yet to file for relief.

The experiences of lawyers in Federal Defender offices confirm what is apparent from the Sentencing Commission's data: In judicial districts across the country, there remain significant numbers of eligible defendants who are currently incarcerated and have yet to seek modified sentences under Section 3582, or whose cases are currently on appeal. Without this Court's intervention, many of these defendants will be subjected to binding application of the Sentencing Guidelines if they seek modifications under Section 3582(c)(2).

The potential sentence reductions available in these proceedings have real, meaningful impacts on the lives of defendants. The March 2009 Report determined that defendants have received an average reduction of 24 months' incarceration upon resentencing. MARCH 2009 REPORT, at tbl.8. But the determination in some circuits that district courts are bound by the revised Guidelines range in Section 3582 proceedings effectively prevents district courts from giving full consideration to all applicable 3553(a) factors, as well as the overarching command to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes" of sentencing.

Moreover, many of the defendants who have yet to seek relief or whose cases are currently on appeal are the individuals who stand to benefit the most from a holding that the Guidelines are advisory in Section 3582 proceedings. That is so because many defendants close to the end of their sentences have already stipulated to two-level reductions or had their sentences modified under § 3582(c)(2). As

a matter of efficiency and in the interest of clients close to the end of their sentences, attorneys in Federal Defender offices across the country have sought sentence reductions for defendants close to the end of their sentences first; it is those defendants with longer pending sentences who comprise the bulk of remaining eligible defendants.

B. Defendants Within Some Circuits Are Erroneously Subjected To Mandatory Application Of The Guidelines.

The federal courts are divided over whether the amended crack guideline ranges are binding in Section 3582 proceedings. In addition to the Fourth Circuit, five other federal courts of appeals have enforced the Sentencing Commission's policy statement, U.S.S.G. § 1B1.10 cmt. n.3, and held that the amended guideline ranges are binding when applied retroactively under § 3582(c)(2). *See United States v. Fanfan*, No. 08-2062, 2009 WL 531281 (1st Cir. Mar. 4, 2009); *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009), *petition for cert. pending*, No. 08-1149 (filed Mar. 16, 2009); *United States v. Melvin*, No. 08-13497, 2009 WL 236053 (11th Cir. Feb. 3, 2009), *petition for cert. pending*, No. 08-8664 (filed Feb. 10, 2009); *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009); *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008), *petition for cert. pending*, No. 08-8318 (filed Jan. 21, 2009). In the interest of obtaining a ruling as quickly as possible, the NAFD as *amicus curiae* supports this Court granting certiorari in any of the cases in which petitions presenting this question are pending.

These decisions conflict with the decision of the Ninth Circuit in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), and with the decisions of two federal district courts in circuits that have yet to rule on the issue. *See United States v. Blakely*, No. 3:02-CR-209-K, 2009 WL 174265 (N.D. Tex. Jan. 23, 2009); *United States v. Ragland*, 568 F. Supp. 2d 19 (D.D.C. 2008); *cf. United States v. Thompson*, No. 2-03-cr-24, 2008 WL 4456850, at *3 (M.D. Fla. Oct. 1, 2008) (noting practice to enforce § 1B1.10 limitations but finding "a unique factor . . . which justifies a further reduction based upon *Kimbrough*," and imposing sentence more than five years below the amended Guidelines range). Relying on this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), these courts have held that the Sentencing Guidelines are advisory and that district courts can impose sentences below the amended guideline ranges in Section 3582 proceedings. Because of this conflict, defendants in certain districts can receive new sentences below their applicable Guidelines range in Section 3582 proceedings based on a district court's consideration of all the § 3553(a) factors, while below-Guidelines sentences are unavailable to defendants in identical proceedings in other districts.

Where they are permitted the discretion to do so, district courts have determined that below-Guidelines sentences were appropriate for certain defendants based on consideration of the § 3553(a) factors. *See, e.g.*, *Blakely*, 2009 WL 174265, at *13 (imposing sentence of time served, 23 months below the revised Guidelines minimum); Order, *United States v. Fox*, No. 3:96-cr-00080 (JKS), at 6-8 (D.

Alaska Nov. 20, 2008) (imposing sentence of time served, more than eleven years below the revised Guidelines range); *United States v. Reid*, 584 F. Supp. 2d 187 (D.D.C. 2008) (imposing sentence of time served, more than two months below the revised Guidelines range). In *Blakely*, *Fox*, and *Reid*, the district courts took similar approaches in arriving at below-Guidelines sentences: they calculated the amended Guidelines range, considered whether a reduction was warranted and determined what sentence would best serve the purposes of sentencing set forth in § 3553(a)(2). Relying on *Hicks*, the district court in *Fox* noted that had the defendant dealt powder cocaine rather than crack cocaine, his minimum Guidelines sentence would have been 16 years less than his minimum Guidelines sentence under the *amended* Guidelines. Based on its analysis of the § 3553(a) factors, the defendant's behavior in prison, and the continuing unwarranted disparity between the Guidelines' treatment of crack and powder cocaine offenses, the district court reduced the sentence to time served. Order, *Fox*, No. 3:96-cr-00080 (JKS), at 7. Courts in these districts can fully consider, among other factors, the defendant's behavior over the course of the potentially many years that the individual has already served in prison, developments in the defendant's health and family circumstances, and evidence of remorse and rehabilitation. These courts may, of course, also reduce a sentence below the low end of the revised Guidelines range based on a determination that the crack-to-powder ratio continues to be unwarranted. *See United States v. Kimbrough*, 128 S. Ct. 558, 569 (2007).

A defendant in the Fourth Circuit (or the other circuits that have held that the amended Guidelines are binding) is not afforded the same possible sentencing outcomes. A district court in one of those circuits is prohibited from imposing a non-Guidelines sentence, even if that court concluded that a below-Guidelines sentence would best serve the purposes of sentencing in a particular case.

The conflicting application of § 3582(c)(2) across districts is affecting thousands of defendants who are eligible for sentence reductions. According to the Sentencing Commission, over 12,000 defendants were initially eligible for resentencing in the six circuits that have ruled that the amended Guidelines are binding—including over 5,000 in the Fourth Circuit alone—and many remain eligible today. *See* Impact Memorandum, at 15, tbl.3. These defendants are currently subject to a different sentencing regime than that applied by district courts in the Ninth Circuit, the Northern District of Texas, and the District of Columbia, where over 1,200 defendants were eligible for resentencing based on a district court's full consideration of all the 3553(a) factors. *See id.*

This Court's immediate consideration of the relationship between the retroactive crack cocaine sentencing Guidelines and this Court's decision in *Booker* is necessary to eliminate these unwarranted sentencing disparities across federal districts.

C. This Issue Will Recur.

The history and frequency of retroactive amendments to the Sentencing Guidelines demonstrates that the question of the proper weight to accord the Sentencing Guidelines on resentencing proceedings will undoubtedly recur. Since 1989, the Sentencing Commission has revised the Guidelines retroactively 27 times, with the most recent amendment effective as of May 1, 2008. *See* U.S.S.G. § 1B1.10(c), app. C, vol. III, Amend. 715. Several of the amendments, like the reduction in the crack-to-powder cocaine ratio, were triggered by new data on sentencing disparities that were unavailable when the Guidelines were initially drafted. Moreover, even the Sentencing Commission has recognized that the revised crack-to-powder cocaine ratios are only a partial solution to the unwarranted disparities in sentencing defendants convicted of crimes involving different forms of the same drug. *See* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY, May 2007, at 10 [hereinafter MAY 2007 REPORT] (calling the amendment a "partial remedy"); *cf. Kimbrough*, 128 S. Ct. at 569 (noting that "[t]his modest amendment yields sentences for crack offenses between two and five times longer than sentences for equal amounts of powder" (citation and footnote omitted)). This recent history strongly suggests that the issue of how *Booker* interacts with retroactive amendments will recur.

A few recent retroactive amendments to the Guidelines evidence the frequency, nature and causes of these revisions. For example, in 1993, the

Commission revised the method for calculating the weight of LSD when determining the appropriate offense level under the Guidelines. U.S.S.G. § 1B1.10(c), App. C, vol. I, Amend. 488. According to the Sentencing Commission, the amendment was intended to eliminate "unwarranted disparity among offenses involving the same quantity of actual LSD but different carrier weights," thereby reducing "sentences that are disproportionate to those for other, more dangerous controlled substances." *Id.* vol. I, Amend. 488, Reason for Amend. This amendment was made retroactive. *Id.* vol. I, Amend. 502. Also in 1993, the Commission adopted a retroactive amendment to the drug equivalency tables to reflect the "reassessment of the potency" of the drug PCE. *See id.* vol. 1, Amend. 499, Reason for Amend.; Amend. 502 (applying the change retroactively). In 1995, the Commission similarly altered the method for calculating the weight of marijuana plants for purposes of determining the offense level under the Guidelines, *id.* vol. I, Amend. 516, and applied this change retroactively, *id.* vol. I, Amend. 536. The revision was a result of studies that demonstrated errors in the Commission's understanding of how much actual marijuana a plant yields. *Id.* Reasons for Amend. Finally, in 2003, the Commission altered the way the drug oxycodone was measured when determining the appropriate offense level under the Guidelines. *Id.* vol. II, Amend. 657. The Commission recognized "proportionality issues" in the way quantities of oxycodone were previously determined as a result of greater understanding of the various medicines in which the drug could be found. *See id.* Reason for

Amend. The oxycodone amendment was also applied retroactively. *See id.* Amend. 662.

The frequency of these retroactive amendments, often prompted by an analysis of statistical data that accumulates over time, means that defendants currently serving terms of imprisonment for various offenses stand a real chance of being made eligible for a reduced sentence under Section 3582 based on sentencing disparities that the Sentencing Commission has yet to identify. The question of the weight a district court must give to the Guidelines and the discretion available to impose non-Guidelines sentences in these circumstances will therefore undoubtedly recur.

II. Defendants In Crack Resentencings Are Particularly Deserving Of Full Consideration Of The § 3553(a) Factors By District Courts.

A. The Reduced Crack/Cocaine Ratios Remain Excessively Disparate.

As noted above, in amending the Sentencing Guidelines to reduce the crack-to-powder cocaine ratio, the U.S. Sentencing Commission itself recognized that the amendment was an incomplete solution to the unjustified disparity reflected in the drug quantity ratio. MAY 2007 REPORT, at 10. Indeed, over a decade earlier, in 1995, the Sentencing Commission proposed amendments to the Guidelines which would have implemented a 1:1 ratio. *See* 60 Fed. Reg. 25075-25077 (1995); *Kimbrough*, 128 S. Ct. at 569. In 1997, the Commission proposed a 5:1 ratio, U.S. SENTENCING

COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (Apr. 1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf, and in 2002, it proposed lowering the ratio to *no more than* 20:1, U.S. SENTENCING COMM'N, REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY iv (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf.[3]

Based in part on a recognition that the prior 100:1 ratio did not reflect the Commission's reasoned, empirically-grounded judgment about the relative severity of crack and powder cocaine offenses, this Court held in *Kimbrough* that district courts have discretion to deviate, on policy grounds, from the crack Guidelines. *Kimbrough*, 128 S. Ct. at 575 (crack Guidelines "do not exemplify the Commission's exercise of its characteristic institutional role").

The Guidelines' revised crack-to-powder cocaine ratios, ranging from 25:1 to 80:1, remain subject to challenge because they are still without empirical grounding. *See Kimbrough*, 128 S. Ct. at 569 (revised ratios only partial remedy for problems of disparate treatment of crack and powder cocaine). Many district courts have concluded that a ratio below 25:1 is sufficient to meet the sentencing

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[3] In its May 2007 Report, the Sentencing Commission also examined state sentencing guidelines for crack and powder cocaine offenses. It found that Iowa, the only state in 2002 with a ratio as high as 100:1, had recently amended its state sentencing guidelines to reflect a 10:1 ratio. MAY 2007 REPORT, at 99.

objectives set forth by Congress in 18 U.S.C. § 3553(a). *See, e.g., United States v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464, at *3 (N.D. Ill. Feb. 17, 2009) (substituting 10:1 ratio); *United States v. Fisher*, 451 F. Supp. 2d 553 (S.D.N.Y. 2005) (same); *Simon v. United States*, 361 F. Supp. 2d 35, 48-49 (E.D.N.Y. 2005) (sentence reflecting ratio of either 10:1 or 20:1). District courts should be permitted to deviate from the Guidelines' ratios in resentencing crack defendants pursuant to § 3582(c)(2). Even with the reduced disparity reflected in the amended Guidelines, a district court may "conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." *Kimbrough*, 128 S. Ct. at 575 (quoting 18 U.S.C. § 3553(a)).

This Court recently reaffirmed these principles, and further emphasized that deviation from the crack Guidelines need not be based on factors specific to the defendant. *See United States v. Spears*, 129 S. Ct. 840, 843 (2009) ("[W]ith respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines is not suspect."). Given the Sentencing Commission's own previous proposals to lower the crack-to-powder cocaine ratios below those currently in place, a district court may well still disagree categorically with the amended crack Guidelines when resentencing crack defendants. District courts must have the authority to exercise that discretion.

B. Many Of These Defendants Are Low-Level, Non-Violent Offenders.

The majority of federal crack cocaine offenders have been convicted of performing low-level trafficking functions, and did not engage in aggravating conduct. MAY 2007 REPORT, at 11. Sentencing Commission data reflects that fully two-thirds of crack defendants sentenced in 2000 were street-level dealers, and that this category remained a majority of defendants in 2005. *Id.* at 21. In 2005, violence or threats of violence were involved in only 10% of crack cocaine offenses, and bodily injury occurred in only 5% of offenses. *Id.* at 37. More than half of crack cocaine defendants in 2006 fell into one of the three lowest Criminal History categories—Category I, II, or III—under the Guidelines. *Id.* at 44.

Petitioner Dunphy is an example of low-level crack defendants receiving disproportionately long sentences. Dunphy transported a small amount of crack cocaine to a meeting point only to support her own drug habit. She cooperated with police following her arrest. Dunphy had no prior criminal history. Her original sentence of more than 11 years was the lowest possible within the then-mandatory guidelines range. Similarly, in another of the cases for which a petition for certiorari is currently pending in this Court, *Cunningham v. United States*, No. 08-1149, the petitioner Cunningham had the lowest criminal history category, and was sentenced to the minimum of the applicable guidelines ranges both before and after the § 3582(c)(2) amendment. *See* Petition for certiorari,

at 3-4 (filed Mar. 16, 2009). Petitioner Rhodes, No. 08-8318 (filed Jan. 21, 2009), was likewise sentenced to the minimum of the applicable guidelines ranges both at sentencing and resentencing; indeed, at the original sentencing, the district court apparently considered departing below the applicable guidelines range based on Rhodes's extraordinary acceptance of responsibility. *See Rhodes*, 549 F.3d at 835 n.1.

III. U.S.S.G. § 1B1.10 Should Be Considered Advisory In § 3582(c)(2) Resentencings Under The Sixth Amendment And The Remedial Holding In *United States v. Booker*.

Section 3582(c)(2) provides that "the court may reduce the term of imprisonment, after considering the factors set forth in Section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." Section 3553(a), in turn, advises district courts to consider the applicable Guidelines range for the conduct, as well as characteristics of the individual defendant and the criminal conduct, Congress's goals in sentencing, and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." These considerations are identical to those confronted when a district court imposes an original sentence. *See* 18 U.S.C. § 3553(b)(1).

A Section 3582 proceeding, therefore, requires the district court to weigh the same factors and perform the same essential tasks as it would at a full sentencing. To cabin the district court's discretion

when considering these factors only in the context of Section 3582 resentencings is both illogical and inconsistent with this Court's holding in *Booker*, which rejected "a mandatory system in some cases and a nonmandatory system in others." *Booker*, 543 U.S. at 266. The Sentencing Commission's revised policy statements, set forth in U.S.S.G. § 1B1.10 and adopted one day after this Court's decision in *Kimbrough*, purport to limit a sentencing court's discretion to impose a sentence below the minimum of the amended Guidelines range. These policy statements plainly reflect an attempt to enforce a mandatory system in the context of crack resentencings (as well as resentencings of other defendants under Section 3582(c)(2)), in violation of the Sixth Amendment.

In resentencing crack cocaine defendants, district courts may carry over factual findings from prior sentencing proceedings, including findings about a defendant's criminal history and the nature of his or her conduct. Each § 3553(a) factor need not be considered anew. But there may be additional facts a district court should consider, including a defendant's behavior during the years he or she has been in custody since the original sentencing, any developments in the defendant's family and personal circumstances and any evidence of rehabilitation. In weighing all of the Section 3553(a) factors, however, the revised Guidelines range must be treated as advisory by the district court in order to fashion a sentence only as severe as necessary to address the statutory purposes of sentencing.

Further, in resentencing defendants whose original sentences occurred before *Booker*, district courts should have the discretion to accord greater weight to the § 3553(a) factors in Section 3582 resentencings than may have been accorded in the initial sentencing proceeding, due to the then-mandatory nature of the Guidelines. For example, in *United States v. Melvin*, the district court determined that the Guidelines range for defendant Melvin's crack cocaine offense, even under the amended crack Guidelines, failed to achieve the purposes set forth by Congress in § 3553(a), and instead sentenced Melvin to a shorter term of imprisonment. Brief of Appellee at 13, *United States v. Melvin*, No. 08-13497 (11th Cir. July 28, 2008). This Court's holding in *Booker* grants district courts discretion in crafting sentences appropriate for specific defendants and conduct, and this holding must be applied to all Section 3582 resentencing proceedings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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